Supreme Court, U.S.
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No. 99-1722

IN THE

Supreme Court of the United States

THOMAS TRUCK LEASE, INC.
and GIBSON CONTAINER, INC.,

Petitioners,

v.

J. E. (BILL) MITCHELL, Lee County,
Mississippi Tax Collector,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the federal Commerce Clause requires Lee County, Mississippi, to further apportion ad valorem taxes assessed (under a statutory scheme repealed in 1993) against a fleet of trucks whose only legal tax situs was Lee County, where the fleet was daily fueled, dispatched, garaged and maintained in Lee County, where the fleet traveled approximately one-half of its miles in Mississippi and where the fleet was used daily to transport products manufactured solely in Lee County.

RESPONDENT'S LIST OF PARTIES

Petitioner Gibson Container, the lessee and statutory owner of the fleet, T.Ct. Op. at 3 (Pet. App. at 28),[1] is an Arkansas corporation that manufactures and distributes cardboard boxes, which, during the tax years at issue, had all of its production facilities and administrative offices in Lee County. S. Ct. Op. ¶2 (Pet. App. at 2).[2] Petitioner Thomas Truck is an Alabama corporation with its principal place of business and corporate office in Mississippi. S. Ct. Op. ¶2 (Pet. App. at 2).[3] Respondent Lee County is a political subdivision of the State of Mississippi.

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1. Under Mississippi law, MISS. CODE ANN. § 27-19-3 (1972), Gibson Container, as lessee, is deemed the statutory owner of the fleet. As such, it is the entity statutorily obligated to pay the ad valorem taxes at issue. Thomas Truck's obligation to pay Gibson Container's ad valorem taxes arises under the lease agreement described below.

2. Other than a small administrative office in Arkansas, Gibson Container's sole facility during the tax years at issue was its manufacturing plant in Lee County, Mississippi. T. Tr. at 44-46. Each tractor-truck in the fleet weighed more than 10,000 pounds and was identified by Gibson Container (for purposes of U.S. D.O.T. identification requirements, *see* 49 C.F.R. § 390.21) with a placard stating Gibson Container's principal place of business as Tupelo, (which is in Lee County) Mississippi.

3. Although not strictly pertinent to Gibson Container's obligation to pay ad valorem taxes in Lee County, during the tax years at issue, Thomas Truck's principal corporate office was in Columbus, Mississippi and 95 percent of Thomas Truck's customers were located in Mississippi. T. Tr. at 79-85.

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RESPONDENT'S OBJECTION TO JURISDICTION

Respondent denies that this Court has jurisdiction under the Commerce Clause or under this Court's "dormant" Commerce Clause jurisprudence. This case was correctly decided by the Mississippi Supreme Court upon independently sustainable state law grounds.

RULE 15.2 CORRECTIONS TO PETITIONERS' STATEMENT OF THE CASE

Petitioner's Statement of the Case is factually incorrect and mischaracterizes this case in several respects, the most glaring of which are corrected immediately below:

a. Petitioners have not, contrary to their assertion (Pet. at 2), paid any of the ad valorem taxes at issue.

b. Petitioners' bald statement that Alabama "continues to levy unapportioned ad valorem tax on tractor trucks engaged in interstate commerce" (Pet. at n. 1, *see also* Pet. at 11) disguises the contrived efforts by Petitioners to escape the ad valorem taxes duly assessed by Lee County. Thomas Truck intentionally and wrongfully registered Gibson Container's fleet in Alabama in hopes of escaping its contractual obligation to pay Gibson Container's higher Mississippi ad valorem taxes.

c. Petitioners unfairly characterize the record when they state that "[t]he proof also showed that at least one Gibson Container truck was in each State on virtually every working day of the applicable tax years." Pet. at 9. No lower court made such a finding of fact. Gibson Container's sales manager in fact testified that the tractor-trucks did not follow a fixed route and could

be dispatched to Mississippi one day, Tennessee the next day, Alabama the next day, etc., and that there was "no set pattern at all for where the trucks went from day to day." T. Tr. at 63-65.

RESPONDENT'S STATEMENT OF THE CASE

In 1988 (under a statutory scheme repealed in 1993), Mississippi assessed two types of taxes on trucking companies. First, Mississippi assessed road, bridge and privilege taxes on all trucks (Mississippi-domiciled or not) that were apportioned according to miles traveled in Mississippi. T.Ct. Op. at 4-6 (Pet. App. at 29-31). Second, Mississippi assessed ad valorem taxes on Mississippi-domiciled vehicles in the county in which the owner was located. *Id.*

In this case, Lee County did not seek to collect a use tax or privilege tax from Gibson Container. Instead, it sought to collect ad valorem taxes on the Lee County, Mississippi-domiciled fleet, taxes which are used in Mississippi to pay for benefits such as fire and police protection, public schools and public libraries, benefits enjoyed daily by Gibson Container and its employees during the tax years at issue. T. Tr. at 56-57, 61-65.

The trial court found that the Lee County Tax Collector properly assessed the owner, Gibson Container, for ad valorem taxes on the fleet for the tax years at issue and therefore held that Gibson Container and Thomas Truck (by virtue of its contractual obligation) were jointly and severally liable to Lee County for ad valorem taxes in the amount of $246,078.78. T.Ct. Op. at 3, 8 (Pet. App. at 28, 33). Both the Mississippi Court of Appeals and the Mississippi Supreme Court affirmed.

During the tax years at issue, all fueling and dispatching of the fleet (which was used to daily transport the cardboard boxes

Gibson Container manufactured solely in Lee County) was performed daily at a Lee County facility; all tractor-trucks embarked daily toward their respective destinations from the Lee County facility and returned there each night to be garaged when not in use; all maintenance on the tractor-trucks was performed at the Lee County facility; and, all tractor-trucks (with the exception of two or three) remained garaged in the Lee County facility for the duration of each weekend. T.Ct. Op. at 1, 5 (Pet. App. at 26, 30); T. Tr. at 51-67. In addition, approximately one-half of all miles traveled by the fleet during the tax years at issue were on Mississippi roads. Based upon these findings of fact, the trial court held that the fleet was domiciled in Lee County. T.Ct. Op. at 3 (Pet. App. at 28).

Prior to March 14, 1988, Thomas Truck proposed to lease the fleet to Gibson Container, register the fleet in the State of Mississippi and pay all property and ad valorem taxes in Mississippi. T. Tr. at 60. Thomas Truck's proposal to pay ad valorem taxes on the fleet in Lee County, Mississippi is embodied in the March 14, 1988 lease and each schedule A thereto, under which Thomas Truck specifically agreed "to provide or pay for the state motor vehicle license for the licensed weight shown on schedule A and personal property taxes for each vehicle in the state of domicile. . . ." Record at 400 (Lease at ¶5A). The agreed domicile for each vehicle in the fleet, as set forth on each schedule A to the lease, is Tupelo, (Lee County) Mississippi. Record at 404-407 (representative samples of Schedule A to Lease).

Notwithstanding Gibson Container's statutory obligation to pay ad valorem taxes in Lee County and Thomas Truck's agreement to pay the Lee County ad valorem taxes on Gibson Container's behalf, Thomas Truck intentionally and wrongfully registered the fleet in the State of Alabama and paid taxes there.

The trial court rejected Thomas Truck's intentional efforts to defeat Gibson Container's statutory obligation to pay the higher Mississippi ad valorem taxes, holding that Thomas "wrongfully registered the tractor-truck units in the state of Alabama." T.Ct. Op. at 7 (Pet. App. at 32).[4]

REASONS FOR DENYING THE WRIT

The Petition should be denied because it seeks to overturn findings of fact and conclusions of law made by a Mississippi trial court based upon a Mississippi statutory scheme that no longer exists. Even Petitioners admit that "[t]he scenario presented by this case will not be repeated in Mississippi. . . ." Pet. at 11.

Moreover, as the Mississippi Supreme Court recognized, the ad valorem taxes at issue neither violate the federal Commerce Clause, nor trigger review under this Court's "dormant" Commerce Clause jurisprudence. Under the now repealed Mississippi statutory scheme at issue, "[o]ut-of-state or 'foreign registered' vehicles only pa[id] their apportioned share of road, bridge, use and privilege taxes." T.Ct. Op. at 5 (Pet. App. at 30). Owners of Mississippi-domiciled vehicles like Gibson Container, however, also paid ad valorem taxes on their vehicles in the county in which they were located. *Id.*

By law, ad valorem taxes are paid at the legal situs of the property, not at the lowest priced taxing jurisdiction chosen by the taxpayer, or in this case by one contractually obligated to pay taxes on the taxpayer's behalf. The U.S. Constitution does

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4. Petitioners failed to prove their allegations that Mississippi was party to a version of an International Registration Plan ("IRP") that permitted them to register the fleet in Alabama. T.Ct. Op. at 7-8 (Pet. App. at 32-33).

not empower taxpayers to unqualifiedly pick and choose the state in which they want to pay ad valorem taxes. Yet, Petitioners attempted to do just that.

For example, the fleet was by law and by contract domiciled in Lee County, Mississippi. Gibson Container, the tax obligor, had no office or permanent presence in the State of Alabama or in any other state (except for a small office in Arkansas, with which the fleet had no connection). The only evidence of any presence in Alabama by Gibson Container was gross fleet mileage accrued during the transient daytime presence of an unspecified number of trucks on unspecified days traversing Alabama highways on unspecified routes to deliver an unspecified number of its products (all of which were manufactured in Lee County) to unspecified destinations, some in Alabama, some not. Thus, because Petitioners failed to carry their burden of proving that the fleet, or any definable portion thereof, obtained a legal situs anywhere other than Mississippi so as to displace Lee County's power to assess the ad valorem taxes at issue, the Mississippi Supreme Court rightly concluded that this case is controlled by Mississippi law, rather than by the federal Commerce Clause.[5]

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5. Notwithstanding Gibson Container's lack of legal situs in Alabama, Thomas Truck (whose principal corporate office was in Mississippi and 95 percent of whose customers were in Mississippi) sought to defeat Gibson Container's statutory obligation to pay the higher Mississippi ad valorem taxes by contriving to artificially convert the Mississippi-domiciled fleet into a foreign registered fleet by wrongfully registering the fleet and paying lower taxes in the State of Alabama. The trial court correctly rejected Thomas Truck's contrived efforts. While Thomas Truck may well be disappointed that it was not able to escape the taxes that it is contractually obligated to pay, any additional tax it must pay is the result of its voluntary payment of taxes in the State of Alabama as part of a calculated and wrongful effort to frustrate the legitimate taxing power of the State of Mississippi, not the result of a constitutionally infirm tax levied by Lee County.

Furthermore, and for the same reason, the Mississippi Supreme Court correctly held that even if the Commerce Clause applied, the ad valorem taxes are internally consistent. And, just as Petitioners did not argue below that the ad valorem taxes levied by Lee County are unfairly apportioned when viewed from an economic perspective, they likewise fail to do so here. Instead, Petitioners merely continue a strain of their form-over-substance argument from below that absent a mathematically precise and mechanistically applied formula (driven strictly by gross fleet highway mileage, ignoring the fact that such highway taxes are already apportioned and ignoring the continuous benefits and protections afforded by Lee County that form the basis for ad valorem taxation), Lee County's ad valorem assessment cannot survive constitutional muster. Petitioners' reasoning is nothing more than a thin gloss on the formalism embraced by the rejected *Spector* rule, which was overruled by *Complete Auto Transit*'s functional mandate to decide each case based upon the economic realities. As demonstrated below, when viewed from a practical economic perspective, the Mississippi Supreme Court was correct in its conclusion that the ad valorem taxes at issue are externally consistent, and, therefore fairly apportioned.

Finally, Petitioners ask this Court to revisit half-a-century old decisions without identifying any particular disagreements in the lower courts as to the meaning or application of those decisions. Indeed, as demonstrated below, the decision reached by the Mississippi Supreme Court in this case is entirely consistent with a line of lower court decisions following this Court's precedents.

For these reasons, Petitioners' request that this Court take this case to decide the constitutionality of a statute of no general application, repealed by Mississippi seven years ago, should be denied.

I. Neither the Commerce Clause, this Court's "Dormant" Commerce Clause Jurisprudence, Nor Thomas Truck's Contrived Attempt to Create an Artificial Legal Situs (by Wrongfully Registering the Gibson Container Fleet in Alabama) Defeat Gibson Container's Statutory Obligation to Pay the Ad Valorem Taxes Assessed by Lee County, Mississippi, the Fleet's Only Tax Situs, Nor Do They Shield Thomas Truck From its Contractual Obligation to Pay the Ad Valorem Taxes on Gibson Container's Behalf.

Both federal and state law hold that ad valorem taxes can be imposed by states in which personal property has acquired a legal situs by maintaining a permanent presence during the tax year only. Petitioners' vague and general proof does not demonstrate that the fleet (or a defined portion thereof) acquired a legal situs by maintaining a permanent presence during the tax year in Alabama, or in any other state. Lee County, as the fleet's domicile and only tax situs, thus retained its power to levy ad valorem taxes on the entire fleet.

1. Because Petitioners Failed to Prove that the Fleet Acquired a Taxable Situs Elsewhere, the Mississippi Supreme Court Correctly Concluded that Petitioners Have No Basis for a Commerce Clause Challenge to the Ad Valorem Taxes Levied by Lee County.

Unless personal property domiciled in a state has acquired "a *permanent* location, i.e., a taxable situs, elsewhere[, only the domiciliary state may levy an ad valorem tax.]" *Compare Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590, 602 (1954) (emphasis supplied, internal punctuation omitted) (citing with approval this Court's

longstanding principle as affirmed in *Northwest Airlines v. Minnesota*, 322 U.S. 292 (1944)); *with Northwest Airlines*, 322 U.S. at 297-98 ("no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is *permanently* situated in a State other than the domiciliary State.") (emphasis supplied); *Central Railroad Co. of Pennsylvania v. Commonwealth of Pennsylvania*, 370 U.S. 607, 611-12 (1962) ("[T]he State of domicile retains jurisdiction to tax tangible personal property which has 'not acquired an actual situs elsewhere.' ") (quoted citation omitted) (but reversing in part because taxpayer proved that 158 units acquired a tax situs elsewhere).

To prove another tax situs under *Northwest Airlines* and *Braniff Airways*, it is not sufficient, as Petitioners suggest, to simply prove fleet gross mileage traveled through other states during the tax year, but rather, the taxpayer must prove that the fleet (or a defined portion thereof) maintained a *definable continuous and permanent presence* in another state that provided continuous protection and benefits throughout the tax year. *Compare Northwest Airlines*, 322 U.S. at 299 (fact that "12% to 64% of the property was shown to have been used outside the [domiciliary state] during the tax year" does not deprive the domiciliary state of its power to tax all such property, absent a showing that the property was "*permanently*, that is, for the whole year", situated outside the domiciliary state) (citation omitted) (emphasis supplied) (holding that Minnesota had the power to assess an ad valorem tax on Northwest's entire fleet of aircraft) *with Braniff Airways*, 347 U.S. at 592, 594, 599, 602 (upholding Nebraska's levy of an apportioned ad valorem tax against a due process challenge where specific proof, including Braniff's rental of a depot space and hiring of other services in Nebraska, demonstrated that a defined portion of Braniff's fleet acquired an actual situs in Nebraska).

Moreover, neither mere absence from the domiciliary state nor voluntary payment of ad valorem taxes in another state are sufficient to establish another tax situs or to supplant a domiciliary state's power to levy ad valorem taxes. *See Ryder Truck Rental v. County of Chesterfield*, 449 S.E.2d 813, 816 (Va. 1994) ("Mere absence from one taxing jurisdiction is not sufficient to establish a tax situs in another.") (citation omitted) (rejecting taxpayer's contention that ad valorem taxes assessed against fleet of rental trucks based in a Virginia county should be apportioned simply because fleet traveled approximately 50 percent (or more) of its gross mileage in other states); *Bi Go Markets v. Morton*, 843 S.W.2d 916, 917, 919-20 (Mo. 1992) (rejecting taxpayer's contention that the taxing state was required to apportion an ad valorem tax simply because the taxpayer registered and paid an annual license fee for its fleet of aircraft in another state in which its aircraft landed several times); *see also Peabody Coal Co. v. State Tax Comm'n*, 731 S.W.2d 837, 838-39 (Mo. 1987) *appeal dismissed for want of jurisdiction and cert. denied*, 484 U.S. 960 (1987) (upholding ad valorem taxes assessed against taxpayer's fleet of aircraft where taxpayer's principal place of business was in Missouri and rejecting taxpayer's argument that taxpayer established another state as a tax situs in which its fleet made 31.8 percent of its landings). To establish another tax situs, it is simply not enough to prove gross mileage and adduce general testimony, as Petitioners have, showing that an unspecified portion of the fleet was not in the State of Mississippi during unspecified periods. *Central Railroad Co. of Pennsylvania*, 370 U.S. at 611.

Instead, a taxpayer has the burden of proving by specific evidence "that some portion of its total assets are beyond the reach of the taxing power of its domicile [because] . . . the same property may be similarly taxed in another jurisdiction." *Central Railroad Co. of Pennsylvania*, 370 U.S. at 613 (citation

omitted); *see also Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 175-176 (1983) (quoting *Norton Co. v. Department of Revenue*, 340 U.S. 534, 537-38 (1951)) ("a taxpayer claiming immunity from a tax has the burden of establishing his exemption"); *Miss. State Tax Comm'n v. Medical Devices*, 624 So. 2d 987, 990-91 (Miss. 1993). Thus, here, to supplant the power of Lee County (as the fleet's domicile and only tax situs) to levy the ad valorem taxes at issue, Petitioners had the burden of proving by specific evidence (just as the taxpayers in *Northwest Airlines* and other cases cited herein) that the fleet (or a defined portion thereof) acquired another tax situs by maintaining a definable continuous and permanent presence in another state. Petitioners failed to carry their burden of proof.

Similarly, Petitioners fail to cite a single authority supporting their argument that a domiciliary state must proportionately reduce ad valorem taxes levied on a fleet of trucks with their actual situs in the domiciliary state absent specific evidence that a defined portion of the fleet maintained a definable continuous and permanent presence during the tax year in another state that provided continuous protection and benefits throughout the tax year so as to supplant the taxing power of the domiciliary state.

On the other hand, there are numerous authorities that have considered and rejected arguments such as Petitioners' for the same reasons that the Petitioners' arguments were rejected by the Mississippi Supreme Court. For example, the fleet in *Northwest Airlines* traveled more than 80 percent of its mileage outside the domiciliary state, Minnesota. *Northwest Airlines*, 322 U.S. at 293. Stated another way, less than 20 percent of the total mileage of the fleet (as opposed to 50 percent of the total mileage in the instant case) was in the domiciliary state.

Yet, this Court upheld the domiciliary state's assessment of ad valorem taxes on the entire fleet because the taxpayer failed to show that a "defined part of the [taxed property] ha[d] acquired a permanent location, i.e., a taxing situs, elsewhere." *Id.* at 295.

Additionally, in *Northwest Airlines*, although all rebuilding and overhauling was done in the domiciliary state, maintenance bases were maintained outside the domiciliary state. *Northwest Airlines*, 322 U.S. at 293. Here, the fleet was always maintained, dispatched, fueled, garaged and stored in Lee County (including all weekends). Thus, as in *Northwest Airlines*, none of the Gibson Container fleet was permanently located outside the domiciliary state (here, Mississippi), and, therefore, it could not be (except through Thomas Truck's intentional and wrongful actions) subjected to double ad valorem taxation.[6] *See id.* at 293-96. To state it another way, the ad valorem taxes challenged by Petitioners were assessed against property (the fleet) within the State of Mississippi that received no permanent protection from any other state during the tax years at issue. *Accord Northwest Airlines*, 322 U.S. at 294-96.

Similarly, in *Billings Transfer Corp. v. County of Davidson*, 170 S.E.2d 873 (N.C. 1969), the North Carolina Supreme Court rejected a taxpayer's challenge to ad valorem taxes on facts analogous to the facts upon which Petitioners base their challenge. Like Petitioners, Billings Transfer contended that

6. Thomas Truck's wrongful registration of Gibson Container's fleet and payment of taxes in Alabama does not affect Lee County's power to levy ad valorem taxes. *Northwest Airlines*, 332 U.S. at 295; *Bi Go Markets*, 843 S.W. 2d at 917, 920. To hold otherwise would result in taxpayers arbitrarily selecting a place for taxation of their vehicle in defiance of the law of their domicile, in disregard of the principle of actual situs, thereby giving taxpayers the absurd and unlimited power to arbitrarily frustrate the taxing laws of the state where they are rightfully subject to taxation.

the domiciliary state was required to proportionately reduce ad valorem taxes levied against its fleet based upon gross fleet mileage traveled in other states. *Billings Transfer*, 170 S.E.2d at 876, ¶8.

The issue in *Billings Transfer* was whether the fleet (or a defined portion thereof) acquired another tax situs thereby supplanting the domiciliary's power to levy ad valorem taxes. *Billings Transfer*, 170 S.E.2d at 878. Similar to Gibson Container's relationship to Lee County, Billings Transfer's fleet was domiciled in Davidson County, North Carolina, *id.* at 875, ¶1; used in interstate commerce (hauling furniture, textiles and plywood from North Carolina to seven states), *id.* at 875, ¶2; and maintained in and dispatched from Davidson County. *Billings Transfer*, 170 S.E.2d at 875, ¶3. At trial, Billings Transfer proved gross mileage traveled by its fleet on a state-by-state basis (only 35.88 percent of the miles were traveled in North Carolina). *Id.* at 875-76, ¶¶6-8. Billings Transfer failed (as have Petitioners), however, to carry its burden of proving the specific mileage, or proportion of gross fleet mileage, traveled by any single tractor or tractor-trailer unit in each state. *Billings Transfer*, 170 S.E.2d at 875-76, ¶7.

Following an extensive review of this Court's precedents addressing ad valorem taxation of personal property by domiciliary states, *id.* at 878-83, the North Carolina Supreme Court reasoned that the taxpayer's burden of proving "[c]ontinuous presence throughout the tax year is not shown by evidence which 'merely proves that some determinable fraction of its property is absent from the State for a part of the tax year.' " *Billings Transfer*, 170 S.E.2d at 884-85 (quoted case omitted). Accordingly, the Court held that Billing Transfer's evidence of two general routes and gross fleet state-by-state mileage (as opposed to miles traveled by each truck)

was insufficient to establish a tax situs in another state. *Id.* at 885. The *Billings Transfer* Court further held that because it was "apparent that the state of domicile continued at all times to afford all of the plaintiff's property . . . opportunities, benefits, and protection which . . . were [not] afforded by nondomiciliary jurisdictions *throughout* either of the tax years in question," Billings Transfer's entire fleet was subject to ad valorem taxation in North Carolina. *Billings Transfer*, 170 S.E.2d at 885 (emphasis supplied).

Here, it is likewise apparent that the State of Mississippi "continued at all times to afford all of the [Petitioners' fleet] opportunities, benefits, and protection which . . . were [not] afforded by nondomiciliary jurisdictions *throughout* either of the tax years in question." *Id.* For example, although Gibson Container presented evidence that approximately one-half of the gross fleet mileage accrued on other states' roads, Gibson Container did not prove that any specific tractor-truck or number of tractor-trucks gained a permanent presence in the State of Alabama or in any other state during the tax years at issue. Indeed, Gibson Container's sales manager testified that the tractor-trucks did not follow a fixed route and could be dispatched to Mississippi one day, Tennessee the next day, Alabama the next day, etc., and that there was "no set pattern at all for where the trucks went from day to day." T. Tr. at 63-65.

Gibson Container's proof of gross mileage, transient daytime presence of an unspecified number of trucks on unspecified days traversing Alabama highways on unspecified routes to deliver an unspecified number of its products (all of which were manufactured in Lee County, Mississippi) to unspecified destinations, some in Alabama, some not, is insufficient to establish a taxing situs in Alabama. *See Ryder Truck Rental*, 449 S.E.2d at 816 (proof that Ryder's truck fleet

traveled more than 50 percent of its mileage outside taxing jurisdiction not sufficient to establish tax situs where taxpayer failed to present proof of significant business transactions, cargo loading or unloading, vehicle storage, leasing activities, or other significant activities outside the domiciliary state); *Billings Transfer*, 170 S.E.2d at 876, 885 (proof that tractor-truck fleet traveled approximately 65 percent of its gross mileage outside domiciliary state not sufficient to establish tax situs elsewhere); *accord Central Railroad Co. of Pennsylvania*, 370 U.S. at 616-17 ("To accept the proposition that a mere general showing of continuous use of movable property outside the domiciliary State is sufficient to exclude the taxing power of that State with respect to it, would surely result in an unsound rule. . . .").

Furthermore, Thomas Truck's hopes that its intentional and wrongful registration of Gibson Container's fleet in Alabama and payment of taxes there would defeat Lee County's power to assess ad valorem taxes on the fleet, which was undisputedly domiciled and daily garaged, fueled, maintained in and dispatched from Lee County, Mississippi, the fleet's only tax situs, are misplaced. "The fact that [a taxpayer] pa[ys] personal property taxes . . . upon 'some proportion of [the] full value' of its . . . fleet in some other States does not abridge the power of taxation of [the domiciliary State.]" *Northwest Airlines*, 322 U.S. at 295; *see Bi Go Markets*, 843 S.W. 2d at 917, 920 (taxpayer's registration and payment of taxes in another state did not affect taxing jurisdiction's ability to levy ad valorem tax on entire fleet where taxpayer failed to prove another tax situs).

Finally, Petitioners' reliance on *Braniff Airways* is similarly misplaced. Unlike this case where Petitioners merely presented evidence of gross fleet mileage and general testimony that an unspecified portion of the fleet was outside the domiciliary state

during unspecified periods, in *Braniff Airways* Nebraska proved that a specific portion of the property of the nondomiciliary taxpayer maintained a continuous and permanent presence in Nebraska by specific evidence, including the fact that Braniff rented depot space and hired other services in Nebraska.[7] Thus, *Braniff Airways* is distinguishable from the instant case based upon the same fatal flaw found *Northwest Airlines* and its progeny, i.e., failure to prove that the fleet "acquired a *permanent* location, i.e., a taxable situs, elsewhere." *Braniff Airways*, 347 U.S. at 602 (emphasis supplied).

Thus, because Petitioners failed to prove that the fleet acquired another tax situs, no state other than Mississippi was entitled to levy an ad valorem tax on the fleet. Consequently, Petitioners have no basis for a Commerce Clause challenge to Lee County's assessment of ad valorem taxes because those taxes cannot be repeated in substance or form by other states. *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 260 (1938). Hence, the Mississippi Supreme Court was correct in concluding that "[t]he present case is strictly one of Mississippi statutory application and does not in any way encroach upon the rights guaranteed by the Commerce Clause." S. Ct. Op. at ¶20 (Pet. App. at 11-12).

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7. *Compare Norfolk and Western Railway v. Missouri State Tax Comm'n*, 390 U.S. 317, 327-30 (1968) (holding tax unconstitutional where taxpayer *proved* that only 2.71% of its rolling stock was usually employed in the taxing state, but taxing state levied an assessment on 8.2824% of the taxpayer's rolling stock, an assessment 305% higher than the *proof* demonstrated it was entitled to tax).

2. The Mississippi Supreme Court Did Not Misapply the Internal and External Consistency Tests of *Complete Auto Transit.*

Petitioners' arguments that the Mississippi Supreme Court misapplied the fourth prong of the dormant Commerce Clause test announced in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) are incorrect and based upon meaningless distinctions and erroneous logic. For example, Petitioners argue that the Mississippi Supreme Court committed an error of constitutional proportions when it "incorrectly paraphrase[d]" the internal consistency test by using the word "law" instead of the word "tax," when considering the internal consistency of the ad valorem taxes. Pet. at 6-7. Unless Petitioners can point to a "tax" that can be imposed without an underlying "law," Petitioners' argument is based upon a completely meaningless distinction.

Internal consistency simply means that a tax (read "law imposing a tax") is structured so that if an identical tax were imposed in every jurisdiction, multiple taxation would not occur. *See Goldberg v. Sweet*, 488 U.S. 252, 261 (1989) (tax imposed upon interstate telephone calls charged to an in-state service address internally consistent because only one state would tax each interstate call); *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 185 (1995) (tax imposed upon ticket sales for interstate travel originating in-state internally consistent because only one state would tax each sale). As explained above, the ad valorem taxes at issue (not the highway taxes or other taxes that were apportioned under Mississippi law), are not levied based upon highway miles, but rather upon legal tax situs, which turns on permanent presence in the taxing jurisdiction.

Because Petitioners failed to prove that the fleet acquired any legal situs other than Lee County for the tax years at issue, the Mississippi Supreme Court correctly reasoned (using the language of domicile) that if states having identical laws imposed an identical ad valorem tax on property domiciled in the state, multiple taxation would not occur on these facts because no state except the State of Mississippi could legally impose an ad valorem tax. *See id.*; *Goldberg*, 488 U.S. at 261. Consequently, the Mississippi Supreme Court correctly held that the ad valorem taxes are internally consistent.[8]

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8. Moreover, Petitioners failed to prove that any defined portion of the fleet was not present in Lee County on any given day. *See* T.Ct. Op. at 1 (Pet. App. at 26) (Generally, all of the fleet was in the Lee County facility by the end of each day); T.Ct. Op. at 2 (Pet. App. at 27) ("[N]one of the vehicles in question were ever stored, fueled or maintained [in Alabama]."). Based upon this fact alone and the Court's reasoning in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), Lee County's assessment of ad valorem taxes on the entire fleet "roughly approximates" the fleet's actual presence in Lee County. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. at 445 n.8 (California's assessment of ad valorem taxes on the number of shipping containers found in the state on March 1 of each year was fair apportionment because it "roughly" approximated the containers' average presence in California). *Compare Kenai Peninsula Borough v. Arndt*, 958 P.2d 1101, 1103-05 (Alaska 1998) (presence of vessel on assessment date fixes its tax status for the full year, Commerce Clause does not require apportionment for post-assessment changes); *see also Commonwealth Edison v. Montana*, 453 U.S. 609, 615 (1981) (the goal of this Court's jurisprudence has been to "establish a consistent and rational method of inquiry focusing on the practical effect of a challenged tax") (internal punctuation modified) (quoted and cited cases omitted) (rejecting a Commerce Clause challenge to a flat 30% Montana severance tax on coal); *see also Container Corp.*, 463 U.S. at 169-170 ("The Constitution does not invalidate an apportionment formula whenever it may result in taxation of some income that did not have its source in the taxing State.") (internal punctuation modified) (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 272 (1978)).

Petitioners also objected to the Mississippi Supreme Court's application of the external consistency test, but fail to apply the test themselves. As a guiding principle, this Court has explained that "the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction." *Goldberg*, 488 U.S. at 260-61 (rejecting Commerce Clause challenge to an Illinois excise tax). As correctly explained by the Mississippi Supreme Court, a tax is externally consistent if it reasonably reflects the in-state component of the activity being taxed. *Id.* at 262 (citation omitted). The external consistency test thus looks solely to the practical economic realities of a tax. *Goldberg*, 488 U.S. at 262.

Here, Petitioners do not argue that the ad valorem taxes are unfairly apportioned when viewed from an economic perspective. Instead, they merely continue the form-over-substance argument they made below, albeit now in a somewhat more convoluted form. For example, Petitioners' argument that the taxes at issue are not externally consistent because they are being assessed at the same ad valorem rate that Mississippi trucks that travel all of their miles on Mississippi highways are assessed is a non sequitur.

Petitioners' faulty logic assumes a unitary business tax or other overlapping singular tax system, rather than the dual system of (a) road, bridge and privilege taxes and (b) ad valorem taxes at issue. For example, under the statutory scheme in effect during the tax years at issue, Mississippi assessed road, bridge and privilege taxes on all trucks (Mississippi-domiciled or not) which were apportioned according to the miles traveled in Mississippi, thereby accommodating other states' interests in taxing tractor-trucks using their highways.

Ad valorem taxes, on the other hand, were assessed against Mississippi-domiciled vehicles only, such as Gibson Container's fleet. The ad valorem taxes at issue are based upon actual situs and are used in Mississippi to pay for fire and police protection, public schools and public libraries, benefits provided by Lee County to Gibson Container and its employees on a continual and permanent daily basis during the tax years at issue. Thus, the taxes at issue are not based upon highway mileage, but rather upon the taxpayer's permanent presence in the State of Mississippi.

Here, although an unspecified number of trucks departed from Lee County to transport goods to other states on a daily basis, each truck returned, along with Gibson Container's employees, daily to remain overnight in Lee County. Similarly, Gibson Container employees (and their families) continued to enjoy the benefits provided by Lee County on a daily basis. Petitioners failed to prove that any other state provided the types of benefits provided by Lee County on a daily, continual and permanent basis (as opposed to merely providing highways over which an unspecified portion of the fleet traveled during the day, for which these states received their share of apportioned highway taxes).

Thomas Truck's attempt to create an artificial situs by wrongfully registering the Gibson Container fleet in Alabama (where Gibson Container had no permanent presence) does not change the analysis. Petitioners failed to prove that Alabama provided any of the benefits provided by Lee County on a daily, continual and permanent basis. The benefits provided by Alabama (and by any other state) were those daytime benefits provided in connection with highway travel, paid for by road, bridge and privilege taxes, which were apportioned according to the miles traveled in each state.

Thus, the critical flaw in Petitioners' reasoning is that they assume (without authority) that because the fleet was used in interstate commerce, Lee County must, as a matter of federal constitutional law, reduce their ad valorem taxes by the percentage of miles the fleet collectively traveled on other states' highways without taking into account the continuous and permanent protection and benefits provided by Lee County (which were provided by no other state on a continuous and permanent basis during the tax years at issue) and without taking into account the apportionment of taxes already provided for in connection with highway travel. Such formalistic reasoning cannot withstand scrutiny under *Complete Auto*'s functional mandate, the central purpose of which is to ensure that each state taxes only its fair share of an interstate transaction. *See Goldberg*, 488 U.S. at 260-61. *Complete Auto*'s assessment requires evaluation of the practical economic realities and effects, coincidental or not, of a tax. *See Complete Auto*, 430 U.S. at 279. "Practical rather than logical distinctions must be sought." *Western Live Stock*, 303 U.S. at 259.

Here, Petitioners' argument that Lee County, Mississippi's 30 percent ad valorem assessment on the fleet, which traveled approximately one-half of its miles during the tax years at issue (1,738,421 miles in one year alone) on Mississippi roads; which was garaged on all weekends in Lee County, Mississippi; which returned daily after each trip to Lee County, Mississippi; which was fueled, dispatched and maintained in Lee County, Mississippi; which was domiciled, by law and by contract, in Lee County, Mississippi; which was used daily to transport products, 100 percent of which were manufactured in Lee County, Mississippi, is not fair apportionment from a practical economic perspective does not bear scrutiny. On a daily basis, Gibson Container and its employees enjoyed the benefits paid for in large part by the ad valorem taxes assessed, but not yet

collected from Petitioners by Lee County. Coincidental or not, because the ad valorem taxes assessed by Lee County reasonably reflect the in-state component of the activity being taxed, they are externally consistent. This Court's "dormant" Commerce Clause jurisprudence requires nothing more.[9]

3. This Case Does Not Present a Question Justifying Certiorari Review.

Notwithstanding their hyperbole, even Petitioners' admit that "[t]he scenario presented by this case will not be repeated in Mississippi. . . ." Pet. at 11. Petitioners' statements regarding the IRP and implicit allegations that Alabama and other states levy unconstitutional taxes (Pet. at 10-12) are unsupported by

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9. Even if one ignored the lack of specific evidence and accepted all of Petitioners' arguments at face value, one could logically assume that the fleet's actual presence in the State of Mississippi was much higher than the gross mileage data suggests. For example, the gross mileage data suggests that the fleet was in the State of Mississippi at least 50% of the year, or 182.5 days. To this one must add the fact that the fleet returned to Lee County daily after each trip and remained garaged in Lee County on weekends, which results in, at a minimum, another 104 days (52 weeks X 2 weekend days), which would logically result in the fleet's continual presence in Mississippi for a minimum of 286.5 days or 78.49% of the year. To this one must also add the time each tractor-truck was fueled and maintained in Lee County. While these logical assumptions demonstrate the incorrect and superficial reasoning employed by Petitioners and the distortions of fact their arguments assume, this Court does not need to rely upon assumptions to reject the Petition. Taxpayers like Petitioners who claim an exemption from taxation have the burden of proving that exemption by specific evidence, not broad generalities, which in this case required Petitioners to prove that the entire fleet or a specific defined portion thereof acquired another tax situs. *See infra* pp. 8-16. Thomas Truck's wrongful registration and payment of taxes in Alabama does not change the fact that Petitioners failed to carry their burden of proof. *Id.*

authority and are in fact contradicted by Petitioners' own efforts to avoid Mississippi's then higher ad valorem taxes by wrongfully registering the fleet in Alabama and paying lower taxes there. Petitioners' request that this Court revisit half-a-century old decisions without identifying any particular disagreements in lower court decisions, which are entirely consistent with the Mississippi Supreme Court's decision in this case, to decide the constitutionality of a statute of no general application, repealed by Mississippi seven years ago, is not a request worthy of certiorari review.

CONCLUSION

Petitioners failed to carry their burden of proving that Gibson Container's fleet (or a defined portion thereof) acquired another tax situs during the tax years at issue. Accordingly, the ad valorem taxes levied by Lee County (the fleet's domicile and only tax situs) do not violate the Commerce Clause, nor trigger review under this Court's "dormant" Commerce Clause jurisprudence, because the ad valorem taxes cannot be assessed elsewhere.

Moreover, even if this case triggered constitutional review, the ad valorem taxes here were, as a practical economic reality, fairly apportioned. Furthermore, neither the Commerce Clause nor this Court's "dormant" Commerce Clause jurisprudence give Thomas Truck license to frustrate Lee County's power to levy ad valorem taxes on the Mississippi-domiciled fleet by wrongfully registering Gibson Container's fleet in Alabama and paying taxes there. The artifice employed by Thomas Truck was correctly rejected by the lower courts and should be likewise rejected by this Court.

Finally, this is neither a constitutional case nor a case worthy of certiorari review. It is simply a case of a taxpayer disappointed that its arbitrary efforts to shop for the lowest priced taxing jurisdiction were unsuccessful. For these reasons, the Petition should be denied.

Respectfully submitted,

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